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FEDERAL COMMUNICATIONS COMMISSION
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# Before the
# FEDERAL COMMUNICATIONS COMMISSION
# Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992 | ) | CS Docket No. 94-48 |
| | ) | |
| Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming | ) | |

**COMMENTS OF LIBERTY CABLE COMPANY, INC.**

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**SUMMARY**

The principal goal of the Cable Television and Consumer Protection and Competition Act of 1992 -- competition in the video marketplace -- has not been realized. As a multichannel video programming distributor ("MVPD") competing head-to-head against a cable monopolist, Liberty Cable Company, Inc. ("Liberty") is well aware of the anticompetitive barriers which exist in the video marketplace and, therefore, can offer the Commission a unique perspective on the status of competition in the industry.

Liberty and other competing MVPDs are confronted with significant financial and anticompetitive obstacles which have hindered their ability to effectively compete against franchised cable operators. While Liberty has the financial resources to compete with traditional cable companies, most other alternate providers are unable to attract sufficient capital to expand their systems because of the anticompetitive conditions prevalent in the market.

Liberty's experiences with Time Warner in New York City illustrate the anticompetitive environment created by cable operators to quash competition. Among the anticompetitive practices with which Liberty has first-hand experience are the following: (i) the selective offering of bulk rates; (ii) restrictions on access to programming; and, (iii) restrictions on Liberty's ability to access buildings to hook-up Liberty's service. If alternate providers are ever to effectively compete with cable,

the Commission must take action to ensure that these anticompetitive practices are eliminated and competition is, thereby, fostered.

The Commission has failed to take consistently aggressive and timely action to provide relief from these anticompetitive trade practices. For example, while the Commission adopted regulations which: (i) require uniform rates; (ii) prohibit coerced exclusive programming contracts; and, (iii) define cable inside wiring; the Commission failed in each proceeding to adopt regulations which will nurture competition to the cable monopolists. Specifically, the uniform rate regulations provide cable operators with too much flexibility to continue their discriminatory pricing practices; the prohibition on coerced exclusive programming contracts fails to afford aggrieved MVPDs a right to file complaints; and, the definition of home wiring (for multiple dwelling units) does not allow alternate providers to access easily wiring in multiple dwelling units in order to connect subscribers to competing systems.

While Liberty and others have filed various petitions with the Commission seeking relief from the above-referenced practices, the Commission has yet to act. It is imperative that these issues be resolved and relief granted which will promote competition as quickly as possible for not only is relief important, but also the timing of that relief. It does little good to provide relief to competitors who are no longer in the market because they have fallen victim to anticompetitive practices. In addition, competition in the video marketplace will be further enhanced once the Commission authorizes fully tariffed video dialtone service.

It is imperative that the Commission be more responsive to MVPD's concerns and more assertive in encouraging the growth of competing MVPDs. If the Commission fails to foster competition in the marketplace today, competition will not exist in the future.

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**COMMENTS OF LIBERTY CABLE COMPANY, INC.**

Liberty Cable Company, Inc. ("Liberty"), pursuant to the procedures set forth in Section 1.415 of the Commission's Rules, by its attorneys, submits these Comments in response to the Commission's Notice of Inquiry ("NOI") in the above-referenced proceeding. The NOI seeks information on: (i) the current state of competition in the video marketplace; and, (ii) the extent to which the conduct and practices of multichannel video programming distributors ("MVPDs") and programming vendors have changed since Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 (the "Act").[1/]

These Comments provide the Commission with Liberty's view that the paramount goal of the Act -- competition in the video marketplace -- has not been realized. These Comments cite specific instances of (i) the predatory practices of the Time Warner Cable Group ("Time Warner") operating pursuant to franchise in New York

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[1/] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

City, and (ii) the Commission's failure to take consistently aggressive action to nurture competition to cable monopolists.

## I. **Introduction**.

As a MVPD competing head-to-head with Time Warner, an entrenched cable monopolist in Manhattan, New York, Liberty constantly confronts the barriers to a truly competitive video marketplace. Therefore, Liberty can provide the Commission with an important and unique perspective. Liberty currently services approximately 20,000 subscribers at dozens of sites in the New York metropolitan area.[2/] Almost all of Liberty's subscribers are in multiple dwelling units ("MDUs") -- cooperatives, condominiums and rental apartment buildings.[3/] Liberty is a pioneer in the use of the 18 GHz band to provide video services and has built the largest 18 GHz microwave network in the United States.[4/] Liberty is also

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[2/] Over the past eighteen months, Liberty has increased its subscribership by approximately 10,000. In addition, Liberty is currently adding about 1,000 new subscribers each month. While these statistics on their face may seem encouraging, these Comments: (i) demonstrate that, given the price and quality of Liberty's service, Liberty's penetration of the New York market should be greater than it currently is; (ii) describe the significant competitive barriers Liberty has faced in expanding its consumer base; and, (ii) demonstrate that most other start-up businesses do not have the human and fiscal resources to follow Liberty's lead and compete in the video marketplace.

[3/] Liberty also provides services to several hotels in Manhattan.

[4/] Liberty was intimately involved in the efforts to obtain access to the 18 GHz band for the provision of video service. See In the Matter of Amendment of Part 94 of the Commission's Rules to Permit Private Video Distribution Systems of Video Entertainment Access to the 18 GHz Band, Report and Order, PR Docket No. 90-5, 68 RR 2d 1233 (1991).

among the first MVPDs in the United States to test video dialtone ("VDT") service and technology.[5/]

To the best of its knowledge, Liberty is the only MVPD in the country which is engaged in a direct overbuild (at select locations where tenant organizations or management have invited competition) and which competes head-to-head with a local franchised cable company. However, Liberty's efforts have not been without a substantial expenditure of both human and fiscal resources -- far more than a typical start-up business has access to and far more than Congress ever envisioned would be necessary to bring competition to the video market.

## II. Purpose of the 1992 Cable Act.

When Congress passed the Act (and over-ruled a presidential veto), it was well aware that competition in the cable industry was practically non-existent. Specifically, Congress declared:

> For a variety of reasons, including local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area, most cable television subscribers have no opportunity to select between competing cable systems. Without the presence of another multichannel video programming distributor, a cable system faces no local competitor. The result is undue market power for the cable operator as compared to that of consumers and video programmers.

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[5/] See In the Matter of the Application of New York Telephone for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Construct, Operate, Own and Maintain Facilities and Equipment to Test Video Dialtone Service in Portions of New York City, 8 FCC Rcd 4325 (1993).

> The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers.[6/]

Congress contemplated that the Act would be the vehicle whereby emerging technologies (such as multi-channel, multi-point distribution service ("MMDS"), direct broadcast satellite ("DBS") and satellite master antenna television ("SMATV")) would compete with entrenched cable monopolists.[7/] The stated goals of the Act are to "promote the availability to the public of a diversity of news and information through cable television and other video distribution media" and to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers".[8/] Thus, the Act seeks robust market competition primarily as a means of providing the public with quality services at affordable prices.

However, as discussed more fully below, Congress' vision of competition in the video marketplace has not been realized. Even with the adoption of new cable regulations, the entrenched cable monopolists continue to thwart competition. Their chronic motivation to restrain and exclude competitors is clear.[9/] In

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6/ 106 Stat. at 1460.

7/ See H.R. Rep. No. 628, 102d Cong. at 27 (1992) ("A principal goal of H.R. 4850 is to encourage competition from alternative and new technologies, including competing cable systems, wireless cable, direct broadcast satellites, and satellite master antenna television services.").

8/ 106 Stat. at 1463.

9/ For example, if Time Warner serves one MDU of 200 apartments at $24.00 per apartment per month for basic service, (continued...)

addition, the Commission's failure to consistently nurture competition has played a critical role in delaying the introduction of meaningful competition into the video marketplace to the detriment of the American consumer.

## III. Competition in the 1994 Video Marketplace.

### A. Competition from Alternatives to Cable.

Effective competition does not currently exist in the MVPD market. Although technological alternatives to traditional cable (MMDS, LMDS, SMATV, DBS, VDT) are available, these service providers are limited in number and size. For example, there are only about 100-150 wireless cable systems in the United States serving a total of 500,000 subscribers; the average system has 1,300-1,400 subscribers and the largest has only 35,000-40,000 subscribers.[10/] In comparison, the nation's top one hundred (100) MSOs provide service to more than fifty five (55) million subscribers![11/]

Alternate providers have found it difficult to effectively compete against the cable monopolists primarily because of two,

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[9/] (...continued)
Time Warner will receive $57,600 in annual revenue from this one MDU. If Liberty serves 20,000 subscribers, one would assume, for purposes of this example, that Liberty is serving 100 such buildings thereby reducing Time Warner's annual revenue stream by $5,760,000. Obviously, Time Warner must take such incursions into its revenue stream very seriously.

[10/] See Brown, "Wireless cable looks to expand its niche", Broadcast & Cable, August 2, 1993 at 20; Kerver, "The Dawn of Competition", Cablevision, May 23, 1994 at 71.

[11/] See Kerver, "Cablevision's Top 200", Cablevision, May 23, 1994 at 101.

related problems -- first, the inability of most alternate providers to attract sufficient equity capital[12/] and second, the widespread use of anticompetitive trade practices by many cable operators. Congress recognized the financial burdens of constructing alternative cable systems and, implicitly, the importance of attracting capital resources to build and expand such systems.[13/] These burdens are real and have been exacerbated by the anticompetitive conditions existing in the cable arena. Under the current regulatory environment, where competition is stymied by the questionable trade practices of entrenched monopolists, most investors find it too risky to invest in cable alternatives.[14/] Indeed, the capital markets have recognized these anticompetitive barriers and, as a result, it is difficult (if not impossible) for alternative MVPDs to raise sufficient capital to compete with traditional cable companies on a significant scale.

Liberty, because of its unique capital situation, is one of only a handful of businesses which have risen to the challenge and

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12/ See, e.g., Brown, "Wireless cable looks to expand its niche", at 20 ("Finding capital continues to be difficult for most wireless cable operators. At least part of the problem is that many banks have invested in coaxial cable systems that might see wireless cable as a threat to their business. Most of the capital so far in the wireless cable business has been in the form of equity from entrepreneurs around the country ....")

13/ See 106 Stat. at 1460.

14/ It should be noted that the technological capabilities of alternate providers have not limited their ability to compete in the marketplace. Providers of MMDS, SMATV and DBS currently have the technical ability to expand their systems and provide quality service to a much larger segment of the public.

are actually competing against a cable monopolist.[15] Nonetheless, Liberty and others must overcome substantial obstacles in order to compete effectively in the video marketplace.

### B. A Competitor's Perspective.

Liberty's franchised competitor in New York is Time Warner, which dominates the cable market in Manhattan through Manhattan Cable Television and Paragon Cable Manhattan and, in the outer boroughs, through B-Q Cable, QUICS and Staten Island Cable. In Manhattan, Time Warner has approximately 470,000 subscribers. New York City is the largest municipal franchisor of cable operators in the nation and Time Warner serves more than 90% of the subscribers in New York City as well as customers outside the New York metropolitan area.[16] In comparison, Liberty only serves about 1% of the subscribers in New York City.

For a consumer who wants high quality video service at the lowest price possible, Liberty's service is an attractive alternative to those of Time Warner and other competitors. Liberty offers its basic service to MDUs at a bulk rate of $12.00 per apartment,

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[15] Many non-cable video providers do not directly compete against franchised cable operators. For example, of the existing wireless cable systems, "about 75 are rural systems serving farms, ranches, housing units and other areas not passed by coaxial cable". Brown, "Wireless cable looks to expand its niche", at 20.

[16] In addition, Time Warner is part of a large vertically integrated cable and entertainment company. It has ownership interests in HBO, Cinemax, Comedy Central, Court TV, E! Entertainment, The Cartoon Network, CNN, Headline News, TBS, TNT, BET, QVC Network and QVC Fashion Channel as well as Warner Bros. which produces and distributes motion picture and television programs. See In the Matter of Application of Time Warner Cable for a Finding that Its Exclusive Contract With Court TV is in the Public Interest and Therefore Not Prohibited By 47 C.F.R. § 76.1002(c)(2), CSR-4231-P at p.12 (hereinafter "Time Warner Exclusivity Petition").

regardless of the number of television sets in that apartment. Liberty's competitors generally charge twice as much -- around $24.00 per apartment (with higher rates if a subscriber has more than one television set) -- for similar services.[17] One would certainly expect Liberty to capture a substantial share of the market. However, this has not been the case. Liberty has had to struggle to secure its roughly 1% market share.

While Liberty is fortunate to have the capital resources to compete in the New York metropolitan area, it has been hindered in its efforts to do so by the predatory and exclusionary trade practices of its franchised competitors. As discussed in Section IV below, many of these practices involve pricing, program access and property access.

## IV. Anticompetitive Practices Regarding Pricing, Program Access and Property Access.

In 1990, the Commission prepared a comprehensive report to Congress regarding competition in the cable industry.[18] The Act was an attempt to address many of the anticompetitive practices identified in the 1990 Report. Notwithstanding Congress' good intentions, multiple system operators ("MSOs") and vertically integrated cable operators continue to perpetrate anticompetitive and predatory acts against competing MVPDs and programming vendors.

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[17] For illustrative purposes, attached as Exhibit A is a promotional piece prepared by Liberty which provides a detailed price comparison of its services to those of its competitors.

[18] Competition, Rate Regulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600, 5 FCC Rcd 4962 (1990) ("1990 Report").

Described below are some of Time Warner's practices which have been particularly egregious and detrimental to competition in the New York market including: the selective offering of bulk rates; restrictions on access to programming; restrictions on Liberty's ability to access MDUs to hook-up its service; and, the use of disparaging and false statements regarding the cost and content of Liberty's service.[19/] Also described are specific examples of how Liberty has been injured by these unfair practices.

**A. Pricing.**

The Act requires cable operators to have a rate structure "that is uniform throughout the geographic area in which cable

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[19/] In addition to the questionable trade practices discussed herein, Liberty's competitors have used the New York state court and cable commission processes as a means of intimidating MDU owners that are considering switching to Liberty's service. See, e.g., Paragon Cable Manhattan v. P & S 95th Street Associates and Milstein Properties Corp., N.Y. Sup. Ct., N.Y. County, Index No. 130734/93; In Re: Petition of Paragon Cable Manhattan For Order of Entry For Access to 90 Riverside Drive, State of N.Y. Commission on Cable Television, Docket No. 93-330, Case No. 9211025; In the Matter of the Application of 86th Street Tenants Corp., Fifty-First Beekman Corp., 19 East 88th Street, Inc., 145 East 84th Street Owners Corp., 650 Park Avenue Corp., 45 East 72nd Street, Inc., Phoenix Owners Corp. and 555 Park Avenue, Inc., For a Judgment under Article 78 of the Civil Practice Law and Rules Vacating Orders of Entry v. The New York State Commission on Cable Television, Paragon Cable Manhattan and Time Warner Cable of New York City, N.Y. Sup. Ct., N.Y. County, Index No. 105358/93; Manhattan Cable Television, Inc. v. Fifty-First Beekman Corp., N.Y. Sup. Ct., N.Y. County, Index No. 92-16790, IAS Part 13; Paragon Cable Manhattan v. Glenwood Management Corp. and Arwin-East 88th Street Co., N.Y. Sup. Ct., N.Y. County, Index No. 92-25011; Manhattan Cable Television v. 35 Park Avenue Corp., WPG Residential, Inc. and Williamson, Picket, Gross, Inc., N.Y. Sup. Ct., N.Y. County, Index No. 23339/92; and Paragon Cable Manhattan v. 180 Tenants Corporation and Douglas Elliman-Gibbons & Ives, Inc., N.Y. Sup. Ct., N.Y. County, Index No. 6952/92, IAS Part 12, RJI No. 05396.

service is provided over its cable system".[20/] However, Time Warner has engaged in selective predatory pricing and the offering of so-called "bulk rates" whose purpose appears to be to stamp out competition from Liberty. Liberty has previously provided the Commission with evidence of Time Warner's discriminatory and predatory pricing practices.[21/]

Earlier this year, the Commission adopted regulations requiring cable operators to offer uniform rates. The regulations provide that:

> Cable operators may offer different rates to multiple dwelling units of different sizes and may set rates based on the duration of the contract, provided that the operator can demonstrate that its cost savings vary with the size of the building and the duration of the contract, and as long as the same rate is offered to buildings of the same size with contracts of similar duration.[22/]

Even after the Commission adopted these regulations, Time Warner continues to circumvent both the intent and the terms of the law. Time Warner transgresses the spirit of the uniform rate requirement by only <u>effectively</u> offering bulk discounts to MDUs considering

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[20/] Act Section 3, Section 623 (d) of the Communications Act of 1934.

[21/] <u>See</u> Liberty's Opposition to Petition for Reconsideration in MM Docket No. 92-266 (filed July 21, 1993) at 5 ("For example, during the past year, each time Liberty approached an MDU, hotel or institutional user to interest it in switching to Liberty's service, Time Warner offered the MDU, hotel or institution a rate lower than Liberty's rate. The lower rate was at least 25% lower than Time Warner's normal rate. Worse, many hotels were told that Time Warner would do anything it took (<u>i.e.</u>, lower its rate to whatever level was necessary) to keep the hotel as a customer.").

[22/] 47 C.F.R. § 76.984.

switching to Liberty's service.[23/] And, contrary to the regulations, Time Warner's selective offering of reduced rates does not appear to be cost justified, but is rather, a targeted, predatory response to Liberty's marketing efforts.

Liberty is also aware of several instances where Time Warner has offered MDUs, which are considering a switch to Liberty's service, various "perks" and "under the table" discounts as incentives to stay with Time Warner. For example, Time Warner offered to pay a MDU landlord for the installation of a one million dollar intercom system for Stuyvesant Town, an MDU community located in Manhattan, which was considering subscribing to Liberty's service, but ultimately decided to stay with Time Warner as a result of the incentive.

### B. **Program Access (Vertical Integration)**.

According to the Act, the program access provisions were intended "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming distribution market".[24/] With respect to vertically integrated cable operators and program providers, the Act provides that contracts providing for exclusivity for satellite

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[23/] While Time Warner may have mailed notices to all applicable MDUs referencing the possibility of negotiating a bulk discount, that is different from offering a bulk discount to all applicable MDUs. Indeed, a cable operator is not offering bulk rates to all similarly situated MDUs in a franchise area, if the cable operator sends a detailed notice and makes personal presentations of a bulk rate offer to some MDUs, while mentioning it to others in a "footnote" buried in pages of unrelated materials.

[24/] Act Section 19, Section 628(a) of the Communications Act of 1934.

cable programming between a vertically integrated vendor and a cable operator with an attributable interest in such vendor, in areas served by the cable operator, are prohibited unless the Commission determines that such exclusivity is in the public interest.[25/] Some MSOs have crafted these types of arrangements with programmers simply to deny satellite delivered programming to competing MVPDs, thereby frustrating competition.

A case in point involves Court TV and Time Warner which has an attributable ownership interest in Court TV. In 1991, Time Warner executed a contract with Court TV granting Time Warner the exclusive right to exhibit and to distribute Court TV via satellite in areas served by Time Warner. Over the past three years, the popularity of Court TV has grown steadily.[26/] Indeed, in a market like Manhattan with a highly educated population, Court TV is in high demand.

However, because of the exclusive contract between Time Warner and Court TV, Liberty (and other emerging competitors), up until just this month, did not have access to Court TV in Manhattan. On June 1, 1994, the Commission issued its first program access order which states that:

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25/ Act Section 19, Section 628(c)(2)(D) of the Communications Act of 1934.

26/ Liberty previously provided the Commission with evidence regarding the growth of Court TV. See Liberty's Opposition to Time Warner Exclusivity Petition at 11 where Liberty presented evidence that in the year ending January 31, 1994, Court TV increased its subscribership by 84 percent, and that Court TV's net subscribers increased by an average of 37,500 every business day from December 6, 1993 to January 31, 1994.

> In this situation allowing exclusivity for Court TV, at best, would appear to simply maintain the non-competitive status quo in Manhattan. Thus, we believe that the proposed exclusivity will limit Liberty's ability to develop as an effective competitor, and will also limit the ability of other potential competitors to enter this market. The record reflects that Court TV is popular programming. Time Warner's advertising emphasizing its exclusive ability to carry Court TV demonstrates that Liberty's ability to compete in Manhattan is affected. Liberty contends specifically that denial of access to Court TV limits its ability to secure contracts for multichannel video programming distribution and to compete effectively against Time Warner. We believe that denial of access to popular programming like Court TV inhibits Liberty's ability to develop, and thus restrains competition in this particular local market.[27]

While Liberty applauds the Commission's efforts to liberate Court TV and to promote video competition in Manhattan, Liberty remains concerned that some cable operators will persevere in their efforts to hinder competition by cutting access to the lifeline of every MVPD -- programming -- under the guise that exclusive contracts are in the public interest.

Moreover, with respect to vertically integrated cable operators offering programming that is distributed by cable and not by satellite, Congress has failed to provide competing MVPDs with any relief that would enable them to access such programming. Liberty's problems in this area are best illustrated by its experience with the New York One News service, a service originally produced by Time Warner for its New York City subscribers. After launching New York One, Time Warner sold the program for carriage

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[27] In the Matter of Time Warner Cable Petition for Public Interest Determination under 47 C.F.R. § 76.1002(c)(4) Relating to Exclusive Distribution of Courtroom Television, Memorandum Opinion and Order, CSR-4231-P, released June 1, 1994 at ¶ 37 [footnotes omitted] ("Exclusivity Order").

by other unaffiliated cable operators in the region, yet denied the program to Liberty. Time Warner now aggressively promotes the fact that New York One News is only available to its subscribers in New York City, and not Liberty's 20,000 subscribers. Such actions flout the intention of the Act -- namely, to prevent large companies from suffocating emerging competition in their monopoly markets.

It should make no difference that Time Warner and other MSOs distribute their programs by cable and not by satellite. The literal language of the Act refers to "satellite delivered" programs. However, cable video technology has shifted dramatically in the last two years since the language was drafted. Indeed, some of the major cable operators have announced regional distribution systems for their programming. As the major operators cluster their systems in order to dominate entire regions and as cable operators and regional telephone companies rapidly escalate their deployment of fiber optic networks with virtually unlimited transmission capacity, it is no longer necessary to rely upon satellites to deliver video signals. Satellites will become an increasingly inefficient means to deliver video signals. Therefore, the Commission should recommend to Congress that the Act be amended so as to provide competing MVPDs with program access relief regardless of whether the programming is satellite delivered.[28/]

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[28/] Another programming access problem involves the Commission's current rules involving coerced exclusive programming contracts. As discussed more fully in Section V (B)(2) at page 23 herein, the Commissions rules only permit an aggrieved program provider, not an injured MVPD, to file a complaint with the Commission.

### C. Program Access (Non-Vertical Integration).

The Act also directs the Commission to establish regulations to prohibit cable operators from coercing video programming vendors (whether affiliated or unaffiliated with the cable operator) into contracts providing for exclusivity as a condition of carriage (or retaliating against a vendor that fails to grant exclusivity).[29/] Congress' goals in enacting this prohibition were two-fold -- to protect consumers by protecting programming vendors and to provide all MVPDs with greater access to programming.[30/] Recent events indicate that this goal has not been realized and coercion and collusion remain the order of the day.

Earlier this month in one of the biggest cable channel launches in history, Fox Broadcasting Network's ("Fox") new programming service, FX, was seen all across the United States -- but not in New York City where the service originates. In addition, pursuant to an exclusive agreement between Tele-Communications, Inc. ("TCI") and Fox, FX is being carried only by franchised cable systems.[31/] TCI apparently exerted its market power and coerced cable exclusivity from Fox for FX by implicitly or explicitly threatening to drop Fox's broadcast affiliates from

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29/ Act Section 12, Section 616(a)(2) of the Communications Act of 1934.

30/ Congress recognized that through cable operator control over programmers, a cable operator could use its market power to quash its competitors. See S. Rep. No. 92, 102d Cong., 2d Sess. at 23 (1992).

31/ See, e.g., Petition for Partial Reconsideration filed by the Wireless Cable Association International, Inc. on December 15, 1993 in MM Docket No. 92-265.

TCI's cable systems, or by paying a higher price to exclude alternative MVPDs.[32/] Under either scenario, there is a perverse result -- millions of consumers in New York cannot view FX at any price on any cable or MVPD system.

D. **Property Access**.

One means by which Congress intended to promote increased competition to cable operators was by allowing potential competitors access to existing cable home wiring without destroying or modifying the interior of a subscriber's home. Congress' goal was to make it effortless for the subscriber to switch video service providers.[33/] However, today, when a cable competitor convinces a potential subscriber in a MDU to switch to its service, one of the most significant problems faced by the potential competitor is gaining physical access to the building to effectuate the installation (and removal) of equipment and wiring.

Liberty has first-hand experience with the anticompetitive effects of restricted access to cable wires in MDUs. Liberty typically signs up new subscribers by soliciting existing (and, generally, unhappy) Time Warner subscribers and convincing them to switch to Liberty. Once a subscriber agrees to terminate his Time Warner service, Liberty contacts Time Warner in an effort to

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32/ It has been reported that TCI and Fox reached an agreement whereby TCI would pay no cash to Fox affiliates for retransmission consent, but would carry FX for a $.25 per subscriber fee. See, e.g., Flint, "Fox-TCI Deal: Win-Win for Affiliates", Broadcast and Cable, May 17, 1993 at 10.

33/ See H.R. Rep. No. 628, 102d Cong., 2d Sess. at 118 (1992).

coordinate the hook-up of Liberty's service and the disconnection of Time Warner's service.

It has been Liberty's experience that Time Warner insists on removing its own converter boxes and terminating its own lines. It has also been Liberty's experience that Time Warner is absolutely uncooperative in doing its disconnections in coordination with a Liberty installation. As a result, consumers are often forced to take time off from work to allow a parade of cable technicians to come and go to effectuate the transition. In addition, Time Warner typically questions the adequacy of Liberty's proof that a subscriber wants to terminate Time Warner service and, in some cases, has required Liberty to provide affidavits from subscribers confirming that the subscriber wants to switch to Liberty. Since the current cable home wiring rules give ownership of the inside wire to the subscriber only after termination of service, Time Warner's delaying tactics often hinder Liberty's ability to coordinate the service transition. In many cases, potential Liberty customers decide to forego Liberty's lower priced services simply because it is not worth the aggravation Time Warner creates to switch to Liberty.

Moreover, in an effort to dissuade its subscribers from going through the effort to change service providers, Time Warner has circulated false statements to persons who have asked that their Time Warner service be disconnected. Attached herewith as Exhibit B are (i) a letter from Liberty's President, Peter O. Price, to Eileen Huggard of the New York Department of Telecommunications and Energy; and, (ii) a letter from Alexis Merritt of Time Warner to

Mr. Love, a Time Warner subscriber seeking to obtain Liberty's service. As Mr. Price's letter states, Time Warner is interfering with a subscriber's right -- exercised either personally or through Liberty -- to disconnect the subscriber's own television set from Time Warner's cable. Obviously, Time Warner's efforts to complicate the service transition discourage competition and inhibit consumer choice.

### E. Disparaging and False Advertising.

Competition in Manhattan is hurt not only by Time Warner's flagrant violations of the Act and the Commission's cable regulations, but also by Time Warner's tactics in marketing its cable service. As the Time Warner marketing handout attached herewith as Exhibit C illustrates, Time Warner will not hesitate to falsely disparage Liberty and SMATV technology. For example, the Time Warner handout falsely states:

> In Manhattan, underground transmission of video signals via fiber and coaxial cable is the optimum method to achieve superior reliability. Microwave transmission, used by Liberty, has a long history of questionable reliability. During recent storms in New York City, entire Liberty buildings were without service for up to three days.

Liberty's signal and the quality of its picture are objectively and subjectively equal to or better than those of its competitors and its claims regarding Liberty outages are patently untruthful.[34/]

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[34/] Attached as Exhibit D is an advertisement which contains testimonials of Liberty's customers touting the quality of Liberty's service.

## V. **The Commission has Failed to Nurture Competition in the Video Marketplace.**

Since passage of the Act, the Commission has failed to take an aggressive, pro-competitive stand in many of its cable decisions. When relief has been forthcoming, the Commission has often not provided competing MVPDs with the kind of expeditious relief necessary to enable competition.

Liberty acknowledges that in 1992 Congress handed the Commission an arduous task. Liberty also acknowledges the complexities and ambiguities of the Act and appreciates the Commission's efforts to adopt reasonable and effective regulations to implement the Act. Liberty also realizes that the recent changes in Commission leadership, organization, and even office locations have affected the Commission's ability to promptly resolve the problems plaguing competition in the cable industry.

However, the fact that a competing MVPD must commit substantial resources to actively participate in countless, and seemingly endless, Commission proceedings in order to assure that its perspective is taken into account cannot be what Congress intended.[35/] In addition, the inability of agency processes to resolve these issues in a timely manner, not to mention the substantial legal costs associated with pursuing a resolution, does not promote competition or help to spur investor interest in alternative

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[35/] Indeed, Liberty has sought relief by participating in many Commission proceedings involving the 1992 Cable Act. Attached as Exhibit E is a list of the cable proceedings in which Liberty has participated.

technologies like MMDS, DBS and SMATV.[36] Discussed below are a few examples of the problems which Liberty and others have encountered at the Commission.[37]

**A. Bulk Rates.**

The Commission recently adopted regulations which govern bulk rate arrangements offered by cable operators.[38] However, these regulations provide MSOs with excessive flexibility allowing them to continue to discriminate in their pricing practices under the guise of bulk rate arrangements.

The Commission's new regulations provide little guidance in determining precisely when a cable operator is not offering uniform rates. For example, the rules do not specify a methodology for a cable operator (whose bulk rate practices are challenged) to justify its bulk rates. Likewise, the rules fail to define exactly what constitutes an "offer" of a bulk rate. In addition, potential

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[36] Liberty is concerned that the failure to promote competition in the cable arena today will result in conditions comparable to those existing in the telephone long distance market in the mid-1980's. At that time, the long distance market -- though officially free from AT&T's monopolistic grip -- was far from competitive. As a result of the unfair left-over advantages of AT&T's 100-year monopoly and the Commission's failure to timely respond to these conditions, some of AT&T's initial competitors including Argo Communications, Microtel, Inc. and Litel Telecommunications, Inc. were driven out of business. Liberty does not want the Commission to make the same mistake in the video marketplace.

[37] Liberty is also concerned about the apparent inability of local regulators to play an effective role in promoting competition. Although Liberty and others have filed complaints with state and municipal authorities seeking relief from Time Warner's dubious practices, relief generally has not been obtained at this level. Attached as Exhibit F are various complaints which Liberty and various MDU owners have filed with the New York City Department of Telecommunications and Energy against Time Warner.

[38] See 47 C.F.R. § 76.984.